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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WILL ANDERSON, Defendant and Appellant.	A128527 (Alameda County Super. Ct. No. H-46454)

Defendant was convicted following a jury trial of second degree robbery (Pen. Code, § 211), and admitted a prior strike conviction (Pen. Code, §§ 667, subd. (e)(1)), 1170.12, subd. (c)(1).[1] He was sentenced to an aggravated term of five years for the robbery conviction, doubled for the prior strike, with an additional consecutive term of five years for a prior serious felony conviction (§ 667, subd. (a)).

Defendant claims the trial court erred by denying his motion for mistrial due to prosecutorial misconduct, and challenges the imposition of the five-year enhancement for a prior serious felony conviction. We find that no prosecutorial misconduct occurred, but strike the five-year enhancement imposed pursuant to section 667, subdivision (a), due lack of pleading and proof of the prior serious felony conviction. The judgment is otherwise affirmed.

[1] All further statutory references are to the Penal Code.

STATEMENT OF FACTS

The Bank of the West branch on Mowry Avenue in Fremont was robbed on July 20, 2007. Judith Fonseca was on duty as a teller at the bank that day. Fonseca testified that about noon she noticed a man she identified at trial as defendant in line, and directed him to her station. She described defendant as an "African-American male with dreadlocks and facial hair," wearing a "beanie hat."[2] When defendant approached to within six to eight inches of her, he said, "This is a robbery," and advised Fonseca to give him "just large bills." Fonseca gave defendant bundles of "the hundreds and fifties" from her drawer. Defendant expressed that he "wanted more money," so Fonseca gave him "twenties" in multiple stacks, one of which was a "dye pack" of bills set to explode when the robber walks out of the bank. Defendant ripped apart the dye pack, and took the $20 bills from it, then asked Fonseca for still more money. She gave him the rest of her money in the cash drawer, whereupon he left the bank. Fonseca then hit the alarm under her station. Fonseca viewed defendant in the bank for 30 seconds to a minute before he left.

When the police arrived at the bank, Fonseca provided a description of the bank robber. Shortly thereafter, she was taken to the Garden Court Inn hotel to "look at a possible suspect." Fonseca advised the police that the person "looked similar" to the robber. She was then taken to another location to view a second suspect, who she thought "looked like it could be" the robber, but she "wasn't sure." Fonseca was also shown a photograph of another person that day, and said she "didn't recognize him."

Bank of the West assistant customer service manager Larisa Malchak, witnessed the robbery from the next teller station. She heard a man order Fonseca to give him "large bills" in a low, forceful voice. She observed the man take bills from the dye pack, and place the dye pack back on the counter. He then ran to the door and out of the bank. When the police arrived, Malchak provided a description of the robber: a "light-skinned black male," in his "mid-20's," with a "short beard and goatee," wearing a large black

[2] A bank surveillance photograph of the robber was shown to the jury and admitted as evidence.

and white beanie, a T-shirt and a black racing jacket. She was not able to identify the robber at trial, other than to generally describe him as dark-skinned, with long hair and a hat. She testified that defendant had a "completely different look" in the courtroom. Like Fonseca, Malchak testified that the surveillance photo looked like the robber.

A customer in the bank, Jessica Serva, also observed the robber while standing in line. She realized that a robbery occurred as the robber left the building and one of the tellers began to cry. The man behind her in line was the person who "robbed the bank." She glanced at the man three or four times, for at "least two seconds" each time. Serva did not identify defendant as the bank robber at trial.

The witnesses participated in several lineups after the robbery, with mixed results. In August of 2007, Sergeant Fred Bobbitt of the Fremont Police Department prepared a lineup of six photographs for Fonseca to view. She immediately recognized photo number three, defendant, as the robber. She told the officer, "this is the person [who] robbed me," and was "100 percent sure" of her identification. Fonseca was also sure of her identification of defendant at trial, although he no longer wore his hair in dreadlocks as he did on the day of the robbery and as depicted in the photograph she identified. She testified that her identification at trial was based on the photograph she previously identified.

Malchak looked at the same lineup of six photographs. She told the officer that photo number six, defendant, "resembled the guy that was [the] bank robber," or was "70 percent close to that guy."

In December of 2008, Fonseca and Serva also both viewed a physical lineup of six people, which was requested by defendant.[3] All of the subjects in the lineup had short hair and "a lot of similarities." Fonseca believed she recognized subject number six in the lineup, and so marked her card, although she was not sure of her identification and wrote that the "hair is different." Fonseca was mistaken; subject number six was not

[3] Malchak declined to participate in the physical lineup.

defendant. Fonseca testified that subject number six looked "similar" in appearance, particularly the nose and lips, to number five, who was defendant.

Serva "marked . . . number four" as the bank robber in the physical lineup, although he "had longer hair" when the robbery occurred. Serva was "sure" of her lineup identification, although incorrect; defendant was not number four in the lineup.

Testimony was received from Sergeant Bobbitt, the investigating officer in both this case and a prior bank robbery at the same Bank of the West branch on July 9, 2007. Sergeant Bobbitt interviewed defendant for the first time on July 10, 2007, and showed him a surveillance photo of the bank robbery the day before. Defendant was cooperative, and denied the photograph was him. He also provided the officer with an "alibi," in the form of a description of his activities the day before. Following the first interview, defendant was "no longer a suspect" in the July 9, 2007, bank robbery.

Sergeant Bobbitt subsequently became aware of the Bank of the West robbery on July 20, 2007, and received the surveillance photo of the suspect from an FBI agent. He created a computer-generated photo lineup of six subjects to display to Fonseca and Malchak in August of 2007. Both witnesses identified defendant's photograph, Fonseca with "100 percent" certainty of her identification.

Following the photo identifications, Sergeant Bobbitt conducted another interview of defendant on September 19, 2007, and exhibited the surveillance photo from the July 20, 2007, robbery to him. Defendant stated that the photograph "wasn't him." Defendant had "a blank stare" on his face when looking at the photograph, and "seemed nervous, flustered," unlike his calm demeanor during the prior interview. Defendant indicated to Sergeant Bobbitt that he was in Las Vegas with his girlfriend for three days, beginning July 13, 2007. When told the robbery under investigation occurred on July 20, 2007, defendant changed the duration of his trip to "three weeks after the 13th," with a return date of August 10, 2007.

Sergeant Bobbitt also testified that defendant looked quite different at the physical lineup in December of 2008, than he did when the bank surveillance photograph was taken and the photo lineup was conducted over a year earlier: his hair was much shorter,

and he looked thinner. In light of the change in defendant's appearance, Sergeant Bobbitt was not surprised that the witnesses did not select him at the physical lineup.

The defense presented expert opinion testimony from Dr. Robert Shomer on the vagaries of eyewitness identification testimony, particularly "cross-racial identification." He testified that physical lineups are more reliable than photo lineups, and photo lineups are more reliable and less influenced if the person who administrates the procedure is a neutral party, unfamiliar with the suspect, rather than the investigating officer. According to Dr. Shomer, in-court identifications may be tainted by prior lineup identifications.

DISCUSSION

I. Denial of the Motion for Mistrial.

Defendant argues that the trial court erred by denying his motion for mistrial based on prosecutorial misconduct. The contention focuses on the prosecutor's questioning of Sergeant Bobbitt about his interview with defendant. The recording of the interview includes references by defendant to his criminal history, prior bank robbery convictions, and federal parole. During in limine proceedings, in accordance with a ruling by the trial court, the prosecutor agreed not to offer or play the interview recording. Rather, the prosecutor voiced the intention to elicit testimony on "two areas" of the interview, and "talk about the defendant's demeanor." The trial court also admonished the prosecution that Sergeant Bobbitt was prohibited from referring to defendant's federal parole status or criminal history.

At trial, the prosecutor asked Sergeant Bobbitt if he obtained "a surveillance photo from FBI Special Agent Nancy DeVane," and if she requested that he contact defendant. Sergeant Bobbitt was then asked if he created a photo lineup after speaking with Special Agent DeVane. Defense counsel subsequently objected to the inquiry on the ground that it suggested "some things" to the jury.[4]

[4] Defense counsel did not object to the questioning at the time or seek a curative instruction from the court to avoid "sending red flags" to the jury.

During closing argument, when discussing Sergeant Bobbitt's second interview with defendant, the prosecutor again mentioned that "FBI Special Agent Nancy DeVane" asked the officer to contact defendant. After the jury was excused, defense counsel reiterated the objection to the reference to Special Agent DeVane as raising an implication that defendant "is known to the FBI," and requested a mistrial. The court found that the prosecutor's comments did not deprive defendant of due process, and denied the motion for mistrial. The court also observed that a curative instruction to the jury would only put more "fuel on the flame," although the prosecutor was warned not to "bring up the issue again."

Defendant argues that the prosecutor committed misconduct by repeatedly and prejudicially referring to his "prior criminal acts," an area of inquiry which was prohibited by the trial court's evidentiary ruling. Defendant claims that the prejudicial impact of the prosecutor's improper remarks, particularly considered in light of Fonseca's testimony that he seemed to be familiar with a "dye pack," lies in the implication that he had a "prior history of bank robbery." He maintains that the motion for mistrial was improperly denied given the prosecutor's repeated acts of misconduct.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30 Cal.4th 226, 260.) The focus of the inquiry is on the effect of the prosecutor's conduct on

the defense, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

"Whether misconduct warrants a mistrial is a decision which is within the sound discretion of the trial court." (*People v. Bennett* (2009) 45 Cal.4th 577, 595.) " 'A trial court should grant a motion for mistrial "only when ' "a party's chances of receiving a fair trial have been irreparably damaged" ' ["] [citation], that is, if it is "apprised of prejudice that it judges incurable by admonition or instruction" [citation].' [Citation.] 'We review a trial court's ruling on a motion for mistrial for abuse of discretion.' [Citation.]" (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 138.)

We find that the prosecutor's comments did not warrant a mistrial. We recognize that a prosecutor commits misconduct by violating a prior evidentiary ruling by the trial court, whether done intentionally or not, or by referring to facts not in evidence. (*People v. Friend* (2009) 47 Cal.4th 1, 33; *People v. Hill* (1998) 17 Cal.4th 800, 827–828.) But here, the prosecutor did not violate the court's evidentiary ruling. The prosecutor agreed not to play the audio recordings of the interview, and to avoid any mention of defendant's federal parole status or criminal history. The court warned Sergeant Bobbitt to refrain from the same references during his testimony. During the examination of Sergeant Bobbitt, the prosecutor complied with the restrictions placed on the inquiry into the interview by the court. No mention, direct or indirect, was made of defendant's parole status or history of prior bank robbery convictions. Defense counsel did not request a prohibition against admission of testimony that Sergeant Bobbitt was given a surveillance photo by an FBI agent, and none was ordered by the court. Further, the testimony was relevant to explain the nature of the investigation and reason for the officer's contact with defendant, and was at most negligibly prejudicial to the defense only if the jury made a series of highly speculative and dubious implications to arrive at an insinuation of prior commission of bank robberies. The prosecutor's comments during closing argument were consistent with both the limitations imposed by the court and the state of the evidence presented. No prosecutorial misconduct occurred, and the trial court did not abuse its discretion by denying the motion for mistrial.

II. The Imposition of a Five-year Enhancement Pursuant to Section 667, Subdivision (a).

Defendant also argues that the trial court erred by imposing a five-year enhancement, ostensibly under section 667, subdivision (a). Defendant points out that he was not charged "under section 667, subdivision (a) in the information, in any form." He therefore argues that the sentence on the enhancement violated the "statutory pleading requirement," and his "due process guarantees."

The record supports defendant's claim that a section 667, subdivision (a), enhancement was not alleged. Nevertheless, the trial court, without articulating authority or basis, imposed a consecutive five-year term in addition to the aggravated sentence for robbery, which was doubled due to a prior strike. The minute order and abstract of judgment indicate that the five-year consecutive term was imposed as an enhancement pursuant to section 667, subdivision (a).

We agree with the Attorney General's concession that the enhancement must be stricken. Without any pleading or proof of the section 667 enhancement, the court had no authority to impose a consecutive five-year term. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 749, fn. 7; *People v. Arias* (2010) 182 Cal.App.4th 1009, 1017.) Although defendant did not object to the enhancement in the trial court, the unauthorized sentence may be addressed and corrected in this appeal. (*People v. Corban* (2006) 138 Cal.App.4th 1111, 1117; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390–391.)

DISPOSITION

The matter is remanded to the trial court with directions to strike the consecutive five-year enhancement imposed under section 667, subdivision (a), and to amend the abstract of judgment accordingly. The court is directed to prepare and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.